FILE COPY

Nos. 66, 67, and 68

In the Supreme Court of the United States

OCTOBER TERM, 1947

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

WILBUR ROISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 66

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 67

THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 68

WILBUR ROISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (No. 66, R. 57–61; No. 67, R. 60–64; No. 68, R. 62–66) is reported at 157 F. 2d 787.

JURISDICTION

The judgments of the circuit court of appeals were entered October 4, 1946 (No. 66, R. 61–62; No. 67, R. 64–65; No. 68, R. 66–67) and a petition for rehearing was denied March 20, 1947 (No. 66, R. 73; No. 67, R. 65; No. 68, R. 67). The petitions for writs of certiorari were filed April 17, 1947, and were granted June 9, 1947, the cases being consolidated for argument (No. 66, R. 75; No. 67, R. 67; No. 68, R. 69). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. In a prosecution for deserting from a Civilian Public Service Camp is the question whether there is any basis in fact for the selective service classification one for determination by the trial judge or by the jury?

2. If the question is one for the trial judge, whether the failure of the trial judge to pass on the question in the *Cox* and *Thompson* cases is reversible error in view of the fact that the circuit court of appeals did examine the selective service files which were in evidence and determined that there was ample factual basis for the classifications.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and the Selec-

tive Service Regulations and Opinion 14 of the Director of Selective Service are set forth in the Appendix, *infra*, pp. 51–57.

STATEMENT

A. THE PROCEEDINGS BEFORE THE SELECTIVE SERVICE BOARDS AND IN THE DISTRICT COURTS

1. No. 66, *Cox*.—Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with Local Board No. 2, Jackson County, Oregon (R. 8). He filed his questionnaire (Pl. Ex. No. 2, R. 9) on December 4, 1940. He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber and logs; and that he was engaged in no other business or work. He did not claim exemption from service as a minister or as a conscientious objector.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV–F—not physically fit for service. The classification was changed to I–A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service (Pl. Ex. No. 3, R. 9).

In this document petitioner stated that he joined the Jehovah's Witnesses sect in January 1942 and began witnessing from house to house

and on street corners; that his occupation was "logging and lumbering"; and that his minister was one Elmer Halbert, the leader of the local unit of Jehovah's Witnesses.

The local board on April 3, 1942 rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV–F, as one physically unfit for military service.[1] On June 12, 1942, the local board reclassified petitioner in IV–E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion (R. 12; Def. Ex. No. 7, R. 12). On June 26, 1942, the local board determined that petitioner was properly classified IV–E. On the same date petitioner took an appeal to his board of appeal.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" in the sect and undertook to devote 150 hours monthly to religious work. An affidavit from his minister was filed stating that petitioner had been in the sect since January 1942 and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. (R. 12–15.) On December 7, 1942, the board of appeal also classified him in IV–E.

Petitioner requested the local board to reconsider the classification (Def. Ex. 10, R. 12), but

[1] A summary of the local board action is contained on the last page of the selective service questionnaire (Pl. Ex. No. 2).

on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported on May 26 (R. 10, 16) to the Civilian Public Service Camp to which he was assigned "solely for the purpose of completing the administrative process" (R. 18) and he then left the camp (R. 22).

Thereafter on October 17, 1944, petitioner was indicted (R. 2–3) in the United States District Court for the District of Idaho for having deserted from the camp, in violation of Section 11 of the Selective Training and Service Act. At his trial, the Government's evidence established that petitioner was finally classified IV–E, and that he reported to the Civilian Public Service Camp to which he was assigned and then left the camp without permission (R. 8–10, 15–17).[2] The contents of petitioner's selective service file was received in evidence as exhibits (R. 8–12). For his defense petitioner testified that he sought classification as a minister and that he deserted the Civilian Public Service Camp to which he reported because he was not so classified (R. 20–22); and he testified *de novo* as to his duties as a minister (R. 21). His wife testified that peti-

[2] Petitioner's motion for a directed verdict at the close of the Government's case on the ground that "it is not shown that the Government has considered any evidence showing anything to the contrary to the defendant's contention that he is a minister of the gospel" was denied (R. 19).

tioner was recognized by the sect as a minister, but the testimony was stricken from the record on motion of the Government (R. 23). Petitioner adduced no other evidence.

Over petitioner's objection (R. 28), the court instructed the jury not to concern itself with the action of the selective service boards (R. 26–27). Petitioner was convicted (R. 4) and sentenced to imprisonment for a term of three years and three months and to pay a fine of $300 (R. 4–5).

2. No. 67, *Thompson*.—On October 16, 1940, petitioner registered with Local Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1, R. 9). In his selective service questionnaire (Pl. Ex. No. 2, R. 10), which was executed May 27, 1941, petitioner stated that for the past 13 years his occupation was that of operating a grocery store and that, in addition, he had been a minister in the Jehovah's Witnesses sect since August 1, 1940. In the conscientious objector's form (Pl. Ex. No. 3, R. 10) which he filed at the same time, petitioner stated that he became a member of the sect in August 1940; that after completing high school in 1928 he worked as a grocery clerk and manager until 1935, as an embalmer in 1935, and as a grocery manager and owner thereafter; and that one Fred Kimmet, the local leader of the Jehovah's Witnesses, was his minister of religion.

On May 28, 1941, the local board classified petitioner in III–A, a deferred classification be-

cause of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified IV–E, as a conscientious objector to military service.

On November 5, 1943, petitioner took an appeal to his board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various members of the sect, including Kimmet, the local leader, stating that they recognized him as a minister, and an affidavit by Kimmet, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 519½ hours in which he disposed of 46 bound books, 625 booklets and 673 magazines, and during which he made 105 "back calls" and 316 "sound attendance." Similar supporting documents corroborating petitioner's claim were also filed (see R. 14–17).

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV–E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5, R. 11) and he complied with it by reporting on April 18, 1944 to the Civilian Public Service Camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp (R. 21–22). Within fifteen

763090—47——2

or twenty minutes after reporting petitioner left the camp and did not return (R. 27).

On October 17, 1944, petitioner was indicted (R. 2–3) in the United States District Court for the District of Idaho in one count charging that he departed from the camp without authority, in violation of Section 11 of the Selective Training and Service Act. His trial followed the same pattern as the trial in the *Cox* case *supra*. The Government's proof established that petitioner was finally classified IV–E, that he reported to the camp in compliance with the board's order and that he then left the camp without authority (R. 8—11, 18–20). The pertinent contents of petitioner's selective service file were admitted in evidence (see R. 9, 10, 11, 14, 16).[3]

For his defense, petitioner testified briefly concerning his claim to exemption as a minister (R. 24–27). On the Government's objection, he was not permitted to testify *de novo* concerning his asserted duties as a minister (R. 25). The only other defense witness was a member of the sect who testified that she recognized petitioner as a minister (R. 28).

As in the *Cox* case, the court instructed the jury that it should not concern itself with the

[3] As in the *Cox* case, *supra*, p. 5, petitioner's motion at the close of the Government's case for a directed verdict on the ground that the prosecution had not adduced any evidence showing that petitioner is not a minister was denied (R. 23–24), and a similar motion at the close of the defendant's was likewise denied (R. 28).

selective service classification (R. 32) and the jury thereafter returned a verdict of guilty (R. 4). Petitioner was sentenced to imprisonment for a term of three years and three months and to pay a fine of $300 (R. 4–5).

3. No. 68, *Roisum*.—Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister in the Jehovah's Witnesses sect in June 1940;[4] and that he desired classification in IV–D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with the sect since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his religious work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from com-

[4] Petitioner stated in answer to one question that he had been an ordained minister for three years; in another answer he stated that he had been ordained in June 1940, approximately a year and a half before the questionnaire was filed.

batant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became a Jehovah's Witness in 1930, and that one Kenneth S. Hazen was his minister of religion.

Hazen informed the Selective Service System that the Sect's records of petitioner's religious activities showed that he worked the following number of hours in the months specified:

October 1942	28
November 1942	11
December 1942	47
January 1943	60
February 1943	09
March 1943[6]	21

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's Witnesses as "Assistant Company Servant," "Back Call Servant" and "Book Study Conductor."

On June 25, 1942, the local board classified petitioner in I-A-O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious

[6] Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV-E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected as not being necessary to avoid an injustice.

After several abortive attempts, petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to Civilian Public Service Camp where he remained for five days. At his request, he was granted a weekend pass to leave camp and he never returned. (R. 35.)

On September 21, 1944, he was indicted (R. 2-3) in the United States District Court for the District of Oregon in one count charging that he deserted from the Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act. At petitioner's trial, the Government established through the testimony of the local board clerk and the camp director that petitioner was finally classified IV-E, that he reported to a Civilian Public Service Camp, and that he deserted the camp. At petitioner's instance the entire selective service file was received in evidence as an exhibit offered by the Court (R. 27, 29).

Petitioner was the sole witness for the defense. He testified, *inter alia*, that he had desired classifi-

cation in IV–D as a minister, not IV–E (R. 37). He related the various events before the Selective Service Boards and explained that he had reported to camp only to be in a position to challenge his classification by a habeas corpus proceeding, but he left camp without having resorted to habeas corpus (R. 36–42).

Petitioner offered no other evidence. None of his evidence was excluded by the court. He made no motion for a directed verdict either at the close of the Government's case or at the close of all the testimony. The court refused a request to charge the jury that a verdict of not guilty should be returned if the jury found that the local board "erroneously classified defendant in class IV–E" (R. 50). Instead, the jury was instructed that the board's classification was conclusive (R. 45). The jury returned a verdict of guilty (R. 4–5).

Thereafter a motion was filed on behalf of petitioner for a judgment of acquittal or for a new trial (R. 49). It was considered together with a similar motion of another defendant. The court granted the motion as to the other defendant because "I find no ground for the action of the Draft Board in classifying a man as a conscientious objector when he has not claimed it." The motion was denied as to petitioner because after carefully examining petitioner's selective service file the court determined that there was no invalidity in the classification and thus the motion

had "no ground to support" it. (R. 50–51.) Petitioner was sentenced to imprisonment for two years (R. 5–6).

B. THE PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

Two opinions were written by the circuit court of appeals. The first opinion, filed April 5, 1946, was withdrawn on September 27, 1946, and the causes were resubmitted to the court for further consideration. On October 4, 1946 the present opinion of the court was filed.

In its original opinion the circuit court of appeals concluded that the decision in *Estep* v. *United States,* 327 U. S. 114, required that the causes be remanded to the district courts for new trials because "It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (See No. 66, Pet. 18). A petition for rehearing, filed by the Government, informed the court that the question which the circuit court of appeals held was determined by the *Estep* decision was before this Court in *Gibson* v. *United States,* 329 U. S. 338, which at that time had been restored to the docket for reargument before a full bench. In addition, it was urged on the petition for rehearing that the court erred in

concluding that where a defendant is entitled to challenge his classification in a criminal proceeding, it is a question for the jury to determine whether the defendant is a minister. Petitioners filed a brief opposing the petition for rehearing, and the circuit court of appeals thereafter withdrew its original opinion and ordered the cause resubmitted to the court on the basis of the original oral argument and briefs and the briefs filed on the motion for a rehearing (No. 66, R. 54; No. 67, R. 57–58; No. 68, R. 59–60).

In its second opinion the circuit court of appeals recognized that the petitioners were not entitled to a trial *de novo* on the issue of their classification, and that, "since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (No. 66, R. 60; No. 67, R. 62–63; No. 68, R. 64–65). Accordingly, in each case the judgment of conviction was affirmed (No. 66, R. 61–62; No. 67, R. 64–65; No. 68, R. 66–67).

SUMMARY OF ARGUMENT

1. In all three cases, the trial courts withheld from the jury the question whether the selective service boards exceeded their jurisdiction in refusing to classify petitioners as ministers of religion. We submit that the courts properly

did so because the question whether there is basis in the administrative record for the classification which the boards made is a question of law for the trial judge, and it was not intended by Congress that a jury in a criminal trial should judicially review a finding of fact by a selective service board.

The decision in *Yakus* v. *United States*, 321 U. S. 414, makes it plain that a defendant in a criminal case has no constitutional right to have the jury decide whether the administrative order is valid. *Estep* v. *United States*, 327 U. S. 114, recognized that the function of finding the facts was lodged in the selective service boards and that their determinations were made final. The *Estep* case reserved for judicial review only the jurisdictional questions whether the board acted in conformity with the regulations and whether there was some basis in fact for the classification which the board gave the registrant. The only question presented in these cases is the latter one. Decision of that question requires that the selective service file be examined to determine whether there was any evidence before the board to support its finding. Issues of credibility and of the weight to be given the various items of evidence are solely for the trier of fact and may not be considered on judicial review. Thus all that is before the court is a question as to the legal effect

763090—47——3

of the evidence, and that is a question of law for the trial judge.

The function of the court in this respect is no different from its function when it reviews a verdict of a jury to determine whether there is sufficient evidence to support it. This Court long has justified judicial examination of an administrative record to determine whether there is warrant in the record for the administrative finding on the theory that this is a question of law. For "A finding without evidence is beyond the power" of the agency and an order based on such a finding is "contrary to law." *I. C. C.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 92; Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 74–75. Congress, too, has consistently regarded the question whether there is "some," "any" or "substantial" evidence to support the administrative determination as a question of law. As we show in the Argument, Congress in providing statutory methods of judicial review has lodged the power to decide such questions in judges; it has never made the issue one for the jury.

In our view, the registrant's situation is the same whether he obtains judicial review in a habeas corpus proceeding or whether he challenges the jurisdiction of the local board as a defense in his criminal trial for having violated

the order. He is entitled to a determination by the court as to the legality of the order; he has no right to have the jury judicially review the administrative finding of fact or to substitute its judgment for that of the local board.

2. In petitioner Roisum's trial, the trial judge properly instructed the jury that the selective service classification was final, and he correctly decided that there is basis in fact for the refusal of the selective service board to classify him as a minister. The facts shown by petitioner's selective service file, which is summarized in the Statement, *supra*, pp. 9–11, require the conclusion that petitioner was a farmer by occupation. Indeed, his occupational deferment was sought on that basis. His religious faith was that of the Jehovah's Witnesses. By his own evidence, it was established that the average time devoted by him to religious activities did not exceed one hour and twenty minutes a day. There was no evidence that petitioner was the religious leader of the local unit of Jehovah's Witnesses. He was merely a member of the society who, in his free time, engaged in the religious activities of the group.

3. In the *Cox* and *Thompson* cases, the trial judge neglected to pass on the question which was before him as to the sufficiency of the evidence in the selective service files to support the selective service classifications. This was error, but it was cured by the fact that the circuit court of appeals

did perform this function. Since the question was one of law, the verdict of the jury in each case quite plainly was not influenced by the error of the trial court, and the appellate court was at least as capable as the trial court of deciding the question. Particularly in view of the compelling evidence in the files in support of the classifications, there is no possibility that petitioners were harmed by the error of the trial court. See *Kotteakos* v. *United States,* 328 U. S. 750.

The evidence in the selective service file of petitioner Cox showed that his occupation was that of a truck driver and that he first asserted a claim to a ministerial exemption after he was classified I–A and approximately a year and a half after he had registered for the draft. His claim was that he joined the Jehovah's Witnesses in January 1942 and immediately became a minister of religion. But he performed none of the functions usually associated with the ministry, and his status in the society was no different from that of the other members. The selective service board easily could have concluded that he joined the society for the purpose of seeking a refuge from the draft and, in any event, that he was not in fact functioning as a minister of religion.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as

an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was not the shepherd; he was simply one member of the flock.

ARGUMENT

In each case the defendant's selective service file was received in evidence, but the jury was instructed that the selective service classification was final and not open to review by the jury and that each of the defendants should be convicted if the jury found that he knowingly failed to remain at the Civilian Public Service Camp to which he reported. Thus, the decisive issue presented by the cases is whether in a prosecution under Section 11 of the Selective Training and Service Act of 1940 the defense that the local board exceeded its jurisdiction because there is no basis in fact for its classification is a question for determination by the trial judge or by the jury. If, as we believe, the question of jurisdiction is a question of law for the trial judge, the decisions below should be affirmed. For, as we shall show, the trial judge passed on the question in the *Roisum* case, No. 68, and properly held

that the local board had acted within its jurisdiction. In the *Cox* and *Thompson* cases, Nos. 66 and 67, it does not appear from the record that the trial judge ever formally determined whether there is basis in fact for the defendants' classifications. This was error. But of all types of harmless error, this was the most harmless. For the three judges of the circuit court of appeals examined the selective service files, which were before the court as exhibits, and concluded that there was substantial evidence in support of the classifications of the boards. Since, as we shall show, there were no issues of credibility or of the weight to be given to the various items in the selective service file, the appellate court was at least as capable as the trial judge of passing on the jurisdictional question, and its action thus cured the error of the trial judge.

I

THE QUESTION WHETHER THERE IS ANY BASIS IN FACT FOR A SELECTIVE SERVICE CLASSIFICATION IS A QUESTION OF LAW FOR THE TRIAL JUDGE. CONGRESS DID NOT INTEND THAT A JURY IN A CRIMINAL TRIAL SHOULD JUDICIALLY REVIEW AN ADMINISTRATIVE FINDING OF FACT.

A. *The Constitution.—Yakus* v. *United States*, 321 U. S. 414, specifically decided that the constitutional protections which a defendant in a criminal trial enjoys do not require that in a prosecution for violation of an administrative order the defendant shall be entitled to have the

jury decide whether the order is valid. The facts in that case follow the same pattern as the facts in the present cases.[6] Yakus was indicted for the wilful violation of a price order and in his criminal trial he attempted to show that the order did not conform to the standards prescribed in the Emergency Price Control Act, and that it deprived him of property without the due process of law guaranteed by the Fifth Amendment. He had not attempted to test the validity of the order by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. 321 U. S. at 419.

This Court held that the statutory procedure for review of the order—by protest to the Administrator and, if necessary, application to the Emergency Court of Appeals—was the exclusive road to review of the Price Administrator's order, and the exclusion of the proffered evidence in the criminal trial was upheld. In sustaining the statutory review procedure, the Court said (321 U. S. at 444):

> Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163, the present statute provides a mode of testing the validity of a regula-

[6] In the present cases, however, the evidence relevant to the defense asserted by petitioners was received at the trials.

> tion by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in *Bradley* v. *Richmond, supra* [227 U. S. 477], and in *Wadley Southern Ry. Co.* v. *Georgia, supra,* [235 U. S. 651] 667, 669, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

The Court specifically rejected the argument that the Sixth Amendment required that the jury in the criminal trial should have been permitted to consider the defense that the Price Administrator's order was in excess of his

authority. The court said (321 U. S. at 447–448):[1]

> In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. *Block* v. *Hirsh, supra,* [256 U. S. 135] 158. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury. Cf. *Falbo* v. *United States, supra.*

For the purposes of the present cases, the significant feature of the decision is the square holding that at least so long as a defendant in a criminal court is afforded an adequate opportunity to obtain judicial review of the adminis-

[1] See Quill, *Judicial Review and the Price Control Act*, 24 Boston Univ. L. Rev. 250, 258.

trative order for whose violation he is prosecuted, he does not have a constitutional right to have the jury in the criminal trial consider the question of the validity of the administrative order.

The situation in the *Yakus* case differs from that in petitioners' cases in one respect. Unlike the Emergency Price Control Act, the Selective Training and Service Act does not provide in specific terms for a statutory method of judicial review. Nevertheless, this Court has held that Congress intended a limited judicial review, and that such review may be obtained in the criminal trial for violation of the administrative order, provided that the defendant has exhausted his administrative remedies. *Estep* v. *United States*, 327 U. S. 114. But this does not mean that the issue is one for the jury. If, as we believe, the question of the jurisdiction of the local board to issue the order presents a question of law for the trial judge, the defendant obtains the kind of judicial review which was approved in the *Yakus* case, and which customarily obtains in assessing the legality of an administrative order, without encountering the problem of piecemeal litigation which disturbed some members of the Court in the *Yakus* case. See 321 U. S. at pp. 478–481.

It, of course, is not a novel constitutional doctrine to urge, as we do, that the Constitution does not require that every issue in a criminal trial shall be submitted to the jury. For the settled function of the jury is to determine issues of fact;

the power to decide issues of law is for the trial judge. *Dimick* v. *Schiedt*, 293 U. S. 474, 486; *Patton* v. *United States*, 281 U. S. 276, 288; *Sparf and Hansen* v. *United States*, 156 U. S. 51. Thus, for example, this Court has held that if there is an issue as to the existence of probable cause for the issuance of a search warrant, the question is solely for the trial judge and may not be considered by the jury. *Steele* v. *United States No. 2*, 267 U. S. 505, 511. Similarly, where the question of the legality of a seizure of a ship and its cargo of liquor was presented, this Court held that the issue was for the court and not the jury because it was a question bearing on the admissibility of evidence at the trial. *Ford* v. *United States*, 273 U. S. 593, 605.

We submit, that unless Congress authorized reconsideration in the criminal trial of issues of fact decided by the selective service boards, there is no jury issue in the criminal trial in respect of the validity of the selective service classification. The question is solely one of determining what Congress intended. And it is to that problem that we now turn.

B. *The Estep decision.*—There no longer is any occasion to speculate as to the congressional intent in respect of the question of judicial review of selective service classifications. The decision in *Estep* v. *United States*, 327 U. S. 114, resolved that disputed question. This Court there recognized that the function of finding the facts with

respect to a registrant's claim to exemption or deferment from military service was lodged in the local boards and that their decisions were made final, except where an administrative appeal was permitted. "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies." 327 U. S. at 119.

The Court was unwilling to believe that Congress intended the courts to enforce the criminal sanctions of the Act "where a local board acts so contrary to its granted authority as to exceed its jurisdiction" (327 U. S. at 120). For this reason, it was concluded that Congress intended the finality provision of Section 10 (a) (2) of the Act to apply only to an order which was within the jurisdiction of the board, and that a defendant, who had exhausted his administrative remedies, could challenge the legality of the order in his criminal trial. Fortunately, the Court did not leave in doubt what the scope of judicial review was to be. Speaking for the Court, Mr. Justice Douglas said (327 U. S. at 122–123):

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards

> was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

The quoted language is the language of limited judicial review, not of a trial *de novo*, as petitioners urge. As the Court said, not even the ordinary scope of judicial review under other administrative statutes applies here. The issue in the criminal trial is whether the local board acted within the bounds of its authority; it is not whether the registrant is a minister of religion.[8]

---

[8] Compare *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 195, where this Court rejected the contention that in a criminal prosecution for violation of an order of the Secretary of War the jury should have been permitted to pass on the factual issue previously determined by the Secretary. The Court said:

"It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be deter-

A decision of the board made in conformity with the selective service regulations is final, and the courts may not interfere even though they might weigh the evidence differently, or even though they believe the decision to be erroneous. Where, as in these cases, there has been procedural regularity, the narrow function of the court is to determine whether "there is no basis in fact for the classification." 327 U. S. at 122–123.

The nature of the inquiry requires that this question be determined on the basis of the evidence before the local board. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227. For evidence not adduced before the board, although there was opportunity to do so, has no probative value in showing that the board made its decision on a basis other than the evidence before it. To allow the board's classification to be attacked in court by new evidence would substitute the court for the board as the classifying body. *Tagg Bros.* v. *United States*, 280 U. S. 420, 443–444. Thus, if there is a basis in the evidence before the board for its finding, the classification must be sustained.

If this issue were presented in a habeas corpus proceeding, as in *Eagles* v. *United States ex rel.*

---

mined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress. * * *"

Samuels, 329 U. S. 304, it, of course, would be decided by the trial judge. In our view, the same thing occurs in the criminal trial. For the question is one of law. There is nothing in the issue in respect of which the jury could function. The facts already have been found by the trier of fact. There are no issues of credibility, and there are no questions concerning the weight to be given various items of evidence. All that is before the court is a question as to the legal effect of the evidence contained in the selective service file. See *Sunal* v. *Large*, 157 F. 2d 165, 173 (C. C. A. 4), affirmed June 23, 1947, No. 535, Oct. T. 1946. And this is as much a question for the trial judge as is the question, on motion for judgment of acquittal or for a new trial, whether there is sufficient evidence to support the jury's verdict.[9] In both situations the trial judge determines only whether, viewing the evidence in the light most favorable to the Government, there is sufficient evidence to support the finding of the trier of the facts. See *Estep* v. *United States*, *supra*, at 144–145 (concurring opinion); see also, *N. L. R. B.* v. *Columbian Co.*, 306 U. S. 292, 300.

In dealing with the judicial review of administrative determinations this Court long has recog-

[9] "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court." *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659. To the same effect, *Kottakos* v. *United States*, 328 U. S. 750, 764, fn. 18; cf. *Galloway* v. *United States*, 319 U. S. 372, 390.

nized that it may examine an administrative record to determine whether there is "substantial," or "some," or "any" evidence, as the case may be, to support the administrative finding. And in doing so, whether or not pursuant to specific statutory authorization, the Court always has purported to be examining a question of law.[10] The theory has been that "A finding without evidence is beyond the power" of the agency and an order based on such a finding is "contrary to law."[11] *I. C. C.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 92. See, e. g., *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109; *Crowell* v. *Benson*, 285 U. S. 22, 48, 49–50; *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 276, 277; *R. F. C.*

[10] Thus, even where the review authorized by Congress is limited to questions of law, the court has said that the question whether the administrative finding has "warrant in the record" is open to judicial inquiry. *Dobson* v. *Commissioner*, 320 U. S. 489, 497, 501.

[11] The Report of the Attorney General's Committee on Administrative Procedure (p. 88) summarized the situation as follows:

"In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence. The question whether the administrative finding of fact rests on substantial evidence, it is said, is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized."

v. *Bankers Trust Co.*, 318 U. S. 163, 170; *Dobson* v. *Commissioner*, 320 U. S. 489, 497, 501; *Yakus* v. *United States*, 321 U. S. 414, 437; and see, particularly, Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70.

Congress, too, in establishing statutory procedures for judicial review of administrative determinations has recognized that the judicial function involves an inquiry into a question of law[12] and, at least implicitly, that the task is not one for a jury. Thus, in the many statutory provisions, judicial review procedures have been established for review in a district court,[13] in a circuit court of appeals[14] or in a special tribunal.[15] But so far as we have been able to ascertain, Congress never has directed that an administrative deter-

[12] Thus, for example, Section 3 of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288), provides in respect of review by this Court of determinations of the court of claims:

"In such cases the Supreme Court shall have authority to review, *in addition to other questions of law*, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; * * *." [Italics added.]

[13] See, e. g., the Railroad Unemployment Insurance Act of 1938, 45 U. S. C. 355 (f) and (g); the Urgent Deficiencies Act, 28 U. S. C. 43–48; The Federal Food, Drug and Cosmetic Act, 21 U. S. C. 355 (h), 371 (f).

[14] See, e. g., The Fair Labor Standards Act of 1938, 29 U. S. C. 210; The Civil Aeronautics Act of 1938, 49 U. S. C. 646; The National Labor Relations Act, 29 U. S. C. 160 (e)–(i).

[15] As in Section 204 of the Emergency Price Control Act, 50 U. S. C. App., Supp. V, 924

mination shall be submitted to a jury to determine whether the trier of the facts—the administrative agency—had warrant in the administrative record for its finding.

Accepting this Court's conclusion that Congress intended a classification made by a selective service board to be final unless there is no basis in fact for the classification and the order of the board is thus in excess of its jurisdiction, we submit that there is a total absence of any indication that Congress intended this kind of judicial review—a judicial review which this Court said is narrower than that which normally obtains—to be performed by a jury.[16] This is particularly so when it is recalled that the local board, like the jury, is drawn from the community for the purpose of finding the facts. Its special competence is the same as the jury's. The board having found the facts, there is no occasion for intercession by the jury thereafter. The task of reading a record to determine whether there is a basis in the evidence for a finding of fact is

[16] Compare *Smith* v. *United States*, 157 F. 2d 176, 183–185 (C. C. A. 4), where a judgment of conviction was reversed because the jury, at the defendant's request, was permitted to determine whether the defendant was a minister of religion and whether the local board properly classified him under the statute. The circuit court of appeals thought that "the theory on which the case was tried was so fundamentally wrong that we should take notice of the mistake of our own motion," notwithstanding that the case was tried on that theory at the instance of the defendant and over the objection of the Government.

characteristically one for the judge, whether he is reviewing the findings of an administrative agency, a jury or another judge who was the trier of the facts.

Thus, in our view, the trial judge performs the function in respect of testing the legal validity of a selective service classification that the Emergency Court of Appeals performs in reviewing an order of the Price Administrator. Just as the jury has no place in the latter type of review, it has no function in the process of judicially reviewing a selective service classification. The *Yakus* decision illustrates the fact that neither the Fifth nor the Sixth Amendment entitles a defendant in a criminal trial to a jury verdict on the sufficiency of the evidence to support the administrative finding of fact. Both judicial and congressional practice negative the possibility that Congress ever intended to lodge in a jury in a criminal trial the power judicially to review a selective service classification.

Our view leaves the registrant in the same judicial situation whether he seeks to challenge the administrative determination by resorting to habeas corpus or by asserting the challenge as a defense in his criminal trial. Thus, for example, in *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, the registrant submitted to induction and then resorted to habeas corpus to challenge his selective service classification. The district judge received the selective service file in evidence

and determined, upon examination of it, that there was basis in fact for the classification. When the case reached this Court, the file was independently examined and this Court reached the same conclusion. 329 U. S. at 316–317. If, instead of complying with the order of his local board and submitting to induction, Samuels had refused to submit and had been prosecuted for that refusal, we believe that he would have been entitled to precisely the same judicial review that he had in the habeas corpus proceeding, but nothing more. Congress no more intended judicial review by jury in one case than it did in the other.

II

PETITIONER ROISUM'S TRIAL WAS FREE OF ERROR

The procedural situation presented by petitioner Roisum's case differs in some respects from that of the other two cases. For petitioner's case was tried along the lines which we have outlined in Part I of the Argument. The selective service file was received in evidence (R. 27), and the trial judge determined that there was basis in the record for the refusal of the board to classify petitioner as a minister of religion (R. 51).

None of the evidence which petitioner offered at the trial was erroneously excluded. Petitioner's basic contention is that the court erred in rejecting his requested instruction to the jury and in subsequently denying his motion for

judgment of acquittal after verdict or, in the alternative, for a new trial.

The requested instruction was in the following terms (R. 50):

> The Court hereby instructs you that if you find that Local Board No. 1, Yakima County, Sunnyside, Wash. erroneously classified defendant in Class IV-E, that their order issued to defendant to report to the C. P. S. Camp was void and your verdict should be "not guilty."

Even assuming that the issue was for the jury, the instruction was properly refused. For error in classification is not a defense. In the words of the Court in the *Estep* case (327 U. S. at 122), "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." [17] Petitioner offered no proof that the decision of the local board was not made in conformity with the regulations. Instead his claim, as the district judge characterized it (R. 45), presented a "difference of opinion between the registrant and his Draft Board as to his classification."

After he was convicted, petitioner for the first time challenged the jurisdiction of his local board. By motion for judgment of acquittal notwithstanding the verdict and, in the alterna-

[17] See also, *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, 312.

tive, for a new trial (R. 49, 50; see also, R. 12–13), petitioner asserted the claim that the local board acted arbitrarily and capriciously in denying him classification as a minister of religion and in classifying him as a conscientious objector. The court took the motion under advisement and set it down for argument with a similar motion in a companion case (R. 49). The motion was subsequently denied because the court concluded that it was without basis (R. 51).[18] Upon appeal, the circuit court of appeals thought that the evidence in the selective service file substantially supported the administrative classification (R. 64–65). Thus, the question which remains is whether the courts below properly held that the selective service board did not exceed its jurisdiction by refusing to classify petitioner as a minister of religion.

1. *Ministerial status.*—To demonstrate to the selective service boards that he was an ordained minister of religion, as he claimed, petitioner was required to meet the standards of Section 622.44 (c) of the regulations as construed with respect to Jehovah's Witnesses by the Director of Selective Service in Opinion No. 14 (amended), promulgated November 2, 1942. Section 622.44 (c) (*infra*, p. 54) defined a duly ordained minister of religion as—

[18] At the same time the court granted the motion in the companion case because "I find no ground for the action of the Draft Board" (R. 51).

> a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties.

On June 12, 1941, the Director of Selective Service issued Opinion No. 14 and on November 2, 1942, he issued Opinion No. 14 (amended). The latter opinion was in effect during the period when petitioner was finally classified by his board of appeal. This opinion stated that Jehovah's Witnesses were considered to constitute a recognized religious sect and that certain members of the group "by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion stated that a certified official list had been prepared which contained the names of those members of the sect whose activities made them eligible for classification as a minister of religion. In respect of persons

whose names were not on the list [19] the opinion explained that—

> It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

We think that the Selective Service System thus recognized that the religious leaders of the Jehovah's Witnesses sect were entitled to exemption from military service just as the leaders of any other religious group were entitled to classification in IV–D. On the other hand, it is equally clear that the Selective Service Regulations, as construed by Director's Opinion No. 14 (amended), did not assume that every member of the Jehovah's Witnesses sect should be exempted

[19] It appears from petitioner's selective service file that his name was not on the list.

from military service. Instead, they contemplated that only those persons who stood in the same relation to the Jehovah's Witnesses sect as recognized ministers in other religions do to their followers shall be classified in IV–D. This view is consistent with the view of the circuit courts of appeal in applying the ministerial exemption to factual situations like that presented in this case. Early in the administration of the Act, Judge Simons speaking for the Sixth Circuit in *Rase* v. *United States,* 129 F. 2d 204, 209, met the question squarely in the following terms:

> The phrase "minister of religion" as used in the Act is to be interpreted according to the intention of the Congress, and not by the meaning attached to it by the members of any particular group. Congress undoubtedly intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members, as do regularly ordained ministers of older and better known religious denominations. This is borne out by the provision for the exempting of theological or divinity students. If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between shepherd and flock or between pastor and congregants. Followed to its logical conclusion, this would mean that all of the members of any religious group which imposes upon its adherents an

> obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Act without regard to whether such activity constitutes their sole or principal vocation. It is inconceivable that it was the intention of the Congress to incorporate in the Act an exemption so broad and all-embracing. The statutory exemption must be applied in consonance with the clearly apparent purpose of the Congress, and not in response to the interpretation placed upon it by particular religious groups or their adherents.

See also, *Sunal* v. *Large,* 157 F. 2d 165, 175, and cases there cited.

2. *The facts bearing on petitioner's final classification.*—The facts shown by the documents contained in petitioner's selective service file are summarized in the Statement, *supra,* pp. 9–11. They foreclose the conclusion that there is no basis in the administrative record for the refusal of the board to classify petitioner as a minister of religion.

When petitioner registered with the local board in December 1941, he was twenty-two years old. He requested classification as a minister on the basis of his representation that he was ordained in June 1940, and that of the Watchtower Society that he devoted his "entire time" to his religious work. In the conscientious objector's form which he filed, he identified one Hazen, the local leader of the society, as his minister of religion.

At the very same time that these representations were made, the board was informed, too, that for the past fifteen years petitioner had worked on his father's farm. Indeed, his father submitted an affidavit stating that petitioner was necessary to the operation of the farm, evidently for the purpose of obtaining for petitioner an occupational deferment.[20] It appears from the records of the society, which were submitted to the board, that petitioner devoted as little as 11 hours in the month of November 1942 to activities of the group and that his maximum effort was 69 hours in February 1943. His average for the six month period from October 1942 through March 1943 was one hour and twenty minutes a day! Notwithstanding these figures from the Society's records, the Watchtower Bible and Tract Society represented to the local board that petitioner devoted his "entire time" to his religious work.

There is no evidence in the file that petitioner pursued a course of religious study which equipped him to be a religious leader for other members of the group. Nor is there any evidence that petitioner in fact was the religious leader of the local unit of Jehovah's Witnesses. Indeed, the contrary is true. For Hazen, whom petitioner recognized as his minister, occupied that position. The most that can be said for petitioner is that his

[20] The minutes of the local board recite that on October 6, 1942, the parents personally appeared before the board to urge petitioner's deferment. Their request was denied.

occupation was that of a farmer and his religious faith was that of the Jehovah's Witnesses. The evidence before the board did not require the conclusion that petitioner devoted his life to the furtherance of his religious beliefs, or that his status in the sect in relation to other members of the group is the same as that of a minister to his congregation in other religious groups, or that petitioner regularly performed the religious functions which are performed by ministers in other religious groups.

Unless every active member of the Jehovah's Witnesses group is a minister of religion within the meaning of the act and regulations—and that is the argument which petitioners urge—we think it plain that the classifying board did not flout the command of Congress in denying petitioner an exemption as a minister of religion. To deny petitioner's basic premise that Congress intended to exempt from military service tens of thousands of Jehovah's Witnesses is to deny the obvious. Congress drew a definable line between the shepherd and the flock. And the Selective Service Regulations respected that line. It cannot be said, we submit, that petitioner's evidence permits only the conclusion that he is on the shepherd side of the line. The judicial inquiry probes no further. *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, 307.

III

THE ERROR OF THE DISTRICT COURT IN THE COX AND THOMPSON CASES IN FAILING TO DETERMINE WHETHER THERE IS BASIS IN FACT FOR THE REFUSAL OF THE SELECTIVE SERVICE BOARDS TO CLASSIFY PETITIONERS AS MINISTERS OF RELIGION WAS CURED BY THE PERFORMANCE OF THAT FUNCTION BY THE CIRCUIT COURT OF APPEALS

A. As in the *Roisum* case, the pertinent contents of the selective service files of petitioners Cox and Thompson were received in evidence at their criminal trials (see *supra*, pp. 5, 8). However, unlike the situation in the *Roisum* case, the trial court did not specifically determine that there is basis in fact for the refusal of the classifying boards to classify petitioners as ministers. Concededly, this was error. *Gibson* v. *United States*, 329 U. S. 338.[21] We urge, however, that the error could not have substantially prejudiced petitioners. For on their appeals to the Circuit Court of Appeals for the Ninth Circuit, that court examined the selective service files, which were before it as exhibits, and the court determined that there was substantial evidence in support of the classification made by the selective service boards.

---

[21] The discussion assumes that our position in Part I is correct. If we are mistaken and this Court holds that the question of the jurisdiction of the selective service board is an issue for determination by the jury, then the convictions in all three cases must be reversed.

Section 269 of the Judicial Code (28 U. S. C. 391) provides:

> * * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

This Court has indicated that in each case the application of the statute requires a review of the entire record and a judgment of the court as to the possibility that an error of the trial court did not actually affect substantial rights of the defendant. *Kotteakos* v. *United States,* 328 U. S. 750. We have approached these cases bearing in mind the philosophy in respect of the "harmless error" statute which the *Kotteakos* decision reflects. And in view of the substantial nature of the defense upon which petitioners relied in the district court, we have assumed the burden of demonstrating that the error of the trial court was harmless. See 328 U. S. at 760. Though the burden ordinarily is, and should be, a heavy one, we believe that there is hardly room for doubt in these cases that the error was harmless, if our conception of the defense permitted by the *Estep* decision is correct.

Petitioners' defense in the trial court was that there is no basis in fact for their selective service

classifications.[22] As we have shown, *supra*, pp. 28–29, this foreclosed judicial consideration of issues of credibility or of weight to be given to the various items of evidence in the selective service files. It was for the court to determine only whether on any reasonable view of the evidence in the administrative record there is a basis for the refusal of the boards to classify petitioners as ministers of religion. This function, of course, can be performed at least as well by an appellate court as by a trial court. Indeed, it is the usual function for appellate courts to review a record to determine whether there is sufficient evidence to sustain the findings of the trier of fact. See *Sunal* v. *Large*, *supra*, 157 F. 2d at 173,[23] where the Circuit Court of Appeals for the Fourth Circuit justified its independent examination of the selective service file, as follows:

---

[22] In its full scope their contention was that they were entitled to a trial *de novo* on the issue whether they are ministers of religion. But, as we have shown, *supra*, pp. 26–27, the *Estep* decision does not go that far. They were entitled to show lack of jurisdiction by pointing to the absence of any basis in fact for the refusal of the selective service boards to classify them as ministers or to a substantial departure from the procedural provisions of the act and regulations. Petitioners made no effort to assert the latter ground. Hence, we assume, as did the court below, that their contention amounts to a challenge of the evidential basis for their classifications.

[23] Cf. *Goff* v. *United States*, 135 F. 2d 610 (C. C. A. 4); *Honaker* v. *United States*, 135 F. 2d 613 (C. C. A. 4); *United States* v. *Pitt*, 144 F. 2d 169 (C. C. A. 3).

> If the result of the examination of the Local Board's file as made by the trial judge in this case is to be properly treated as a finding of fact, we would have no proper basis for rejecting it because it is not clearly erroneous. But as the file is completely in writing it may be considered to present a question of law. On this latter assumption we have considered the contents of the file for the purpose of determining, within the proper scope of review, whether it presents sufficient evidence as a matter of law to show that the Local Board exceeded its jurisdiction in its classification; or, on the contrary, whether there was a basis in fact for the classification it made.

The error of the trial court could not possibly have influenced the jury in either case. For the issues which went to the jury were not controverted by petitioners. They did not deny that they knowingly left the Civilian Public Service Camps to which they had reported. Indeed, it is plain that they did so for the purpose of instigating a criminal prosecution in which they could obtain judicial review of their selective service classifications. In these circumstances, it is difficult to perceive how the failure of the trial judge to decide the issue of law which petitioners' defenses presented could have in any way affected the jury's decision on the issues which were before it.

We are not unmindful that in the *Estep* and *Gibson* cases, this Court declined to inquire into the merits of the defenses urged by the defendants. But the Court did so because "the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction." 327 U. S. at 125; 329 U. S. at 351. There is present here what was lacking there. The petitioners were permitted to attempt to show that their local boards exceeded their jurisdiction. The errors occurred not in the exclusion of evidence properly tendered, but in the failure of the trial judge to decide the issue of law which was before him. In this respect, the cases are in the same posture as *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304, and *Eagles* v. *United States ex. rel Horowitz,* 329 U. S. 317. In both cases the selective service files were in the records which were before this Court, and the Court decided the question whether there was basis in fact for the classification, notwithstanding that the circuit court of appeals had not decided that question and that the parties had not pressed for a decision on that point.

Both the harmless error statute and the *Kotteakos* opinion (328 U. S. at 762) admonish that the determination whether there is reversible error present in a case should be based on an examination of the entire record. Petitioner's selective service files are parts of the records which must be

examined. If, as we believe, they convincingly demonstrate that there is basis in fact for the selective service classifications, there is no necessity for remanding the cases to the district court for new trials. The fact that these cases have been pending in the courts for approximately three years emphasizes the interests of public justice that they should be finally disposed of in this Court. To remand them for new trials would mean that the district court would be called upon to decide a question of law which already has been decided by the circuit court of appeals in the same cases and on the basis of the same selective service files upon which the district court would have to base its decision.

B. That the facts in the selective service files abundantly support the decision below that the selective service boards acted on the basis of evidence in refusing to classify petitioners as ministers is plain.[24] On the facts before the board it would have been less than difficult for the board to conclude that petitioner Cox's claim was asserted solely for the purpose of seeking a refuge from the draft. His evidence showed that his occupation is that of a truck driver and that he asserted a claim to exemption as a minister for the first time shortly after he was classified I–A

[24] The contents of Petitioner Cox's file are summarized, *supra*, pp. 3–5, and a summary of Thompson's file appears at pp. 6–8, *supra*.

in 1942, when the war was flagrant, and approximately a year and a half after he had registered for the draft. His claim is that he immediately became a minister in January 1942 when he joined the sect, and that by witnessing from house to house he was performing the functions of a minister. In our view, there is serious doubt concerning his bona fides which the board was entitled to resolve against him. In addition, he did not enjoy the status of a leader in the sect and his functions were no different from those performed by any other members of the sect. Cox was a truck driver by occupation and at best a Jehovah's Witness by faith.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was no shepherd either; like the others, he was only a member of the flock.

CONCLUSION

For the reasons stated, we respectfully submit that the judgments of the circuit court of appeals should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

OCTOBER 1947.

APPENDIX

1. The Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301–318, provided in part, as follows:

> SEC. 5. * * *
>
> (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
>
> * * * * * *
>
> SEC. 10. (a) The President is authorized—
>
> (1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;
>
> (2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist

of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (l) of this Act. * * *

* * * * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act

* * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

2. Opinion No. 14 (amended), issued by the Director of Selective Service November 2, 1942, and construing Section 5 (d) of the Selective Training and Service Act and Section 622.44 of the Selective Service Regulations provided at the time when petitioners were classified, as follows:

Subject: Ministerial Status of Jehovah's Witnesses.

Facts:

Jehovah's Witnesses claim exemption from training and service and classification in Class IV–D as duly ordained ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5 (d). "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44. "*Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of

enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question. May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer. 1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The incorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character or organization of Jehovah's Witnesses renders comparisons with

recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consist of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and pioneers is being transmitted to the State Director of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The mem-

bers of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV–D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained

ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

U. S. GOVERNMENT PRINTING OFFICE: 1947